PUBLIC PROSECUTOR

v.

YAP BOON CHANG

HIGH COURT MALAYA, PENANG
VINCENT NG JC
[CRIMINAL TRIAL NO. 47(58)-42-88]
3 APRIL 1992

EVIDENCE: *Issue - Assessment of credibility of the prosecution witness - The evidence of the accused - Accused at the material time of arrest - Wanted by police for another reason - Whether conduct inconsistent with his innocence - Accused charged for offence under s. 39B(1)(a) Dangerous Drugs Act 1952.*

The accused was charged for drug trafficking under s. 39B(1)(a) Dangerous Drugs Act 1952 and may be sentenced under s. 39B(2) of the same Act.

The learned Judge's decision in the case turned on the assessment of the credibility of the accused and the two defence witnesses and particularly the evidence of (SP2), (SP3), (SP4) the principal witnesses for the prosecution.

Inter alia, the learned Judge also observed that, at the material time of the raid, the accused was a man wanted by the Butterworth police for some reason though not for reasons involving dadah. The raid on that night was not an anti dadah raid but rather a raid by Cawangan Kongsi Gelap to apprehend the accused.

At the time the accused was caught he was only in his white short pants carrying the wallet P7A in his back pocket. These was no dadah found on him.

It was contended by the defence that the charge against the accused was a frame up by the police as he was then a man wanted by the police. The nine packets of drugs used against him may have been found in the said house or at some other premises in their earlier raid but certainly they were not found on him and he was only a transient occupant of the said house.

Held:

[1] As the accused was not also charged for any offence such as under s. 15 of the Dangerous Drugs Act 1952 that would make such evidence relevant, and such evidence do not directly relate to the current charge, the Court ruled that evidence on the urine test was not admissible as its prejudicial effect clearly outweighed its probative value.

[2] As there were two conflicting versions of the incriminating material portions of the evidence against the accused, the Court's decision on the matter would essentially be based on facts. The element of truth is required but the element of probability is the main factor so that if the Court accepts the defence story as probable even though it is not convinced of the truth then the defence has succeeded in creating a doubt in the Court's mind.

[3] It is settled law that there is no legal presumption that an interested witness should not be believed, he or she is entitled to credence until cogent reasons for disbelief can be advanced in the light of evidence to the contrary and the surrounding circumstances.

[4] As the accused was then a wanted man and he was keenly aware of that, his attempt to escape from the police who were obviously on an anti-secret society raid could not be said to be conduct inconsistent with his innocence, especially in regard to the drug offence of which he was currently being charged.

[5] Even three senior police officers acting in concert and talking in near perfect harmony - though drawing a blank on other pertinent details, as appeared to be the case here should not in the interest of justice, be allowed to claim exclusivity or monopoly to the truth without submitting to the Court's overriding duty to examine every detail in their evidence with a view to testing their veracity in conjunction with the rest of the evidence in their totality

[Accused acquitted and discharged on the charge.]

Cases referred to:
Haw Tua Tau v. PP [1981] CLJ (Rep) 11 ***(cit)***
A. Ragunathan v. PP [1982] CLJ (Rep) 63 ***(cit)***
Sebastiano Robert Pavone v. PP [1983] CLJ (Rep) 855 ***(cit)***
PP v. Foong Chee Cheong [1970] 1 MLJ 97
Liow Siow Long v. PP [1970] 1 MLJ 40 ***(cons)***
PP v. Chuah Aun Peng [1991] 2 CLJ (Rep) 65 ***(cons)***

Legislation referred to:
Dangerous Drugs Act 1952, ss. 15, 37(d), (da), 39B(1)(a), (2)

For the public prosecutor - Ishak bin Mohd Yusoff, DPP
For the accused - S. Asamaley; M/s. Mohideen & Asamaley

JUDGMENT

Vincent Ng JC:

Pertuduhan pindaan terhadap tertuduh adalah seperti berikut:

> Bahawa kamu pada 3 Disember 1987 jam lebih kurang 1.35 pagi di suatu kawasan di dalam rumah No. 1017, MK. 4, Permatang Pauh, dalam daerah Seberang Perai Tengah, dalam negeri Pulau Pinang, telah mengedar dadah merbahaya iaitu 66.59 gram monoacetylmorphines dan dengan itu kamu telah melakukan satu kesalahan dibawah s. 39B(1)(a) Akta Dadah Merbahaya 1952 (Semakan 1980) dan boleh dihukum di bawah s. 39B(2) Akta yang sama.

My decision in this case would clearly turn on my assessment of the credibility of the prosecution witnesses and more particularly, the evidence of Insp. Chua Thian Tiong (SP2), S.M. 40860 Manickam a/l Allagapan (SP3), and Konst. 75478 Nadarajan a/l John (SP4), the principal witnesses for the prosecution.

SP2, SP3 and SP4 were more or less consistent witnesses on the principal points in the evidence against the accused being that:

(a) SP2, SP3 and SP4 with three police officers conducted a raid on 3 December 1987 at about 1.35 a.m. on a house at No. 1017 Mukim 4, Permatang Pauh, Butterworth (hereinafter called the said house).

(b) at the time of the raid the house was completely dark as all the electric lighting were switched off and its occupants appeared to be asleep.

(c) the raiding officers were from Cawangan Kongsi Gelap and not from Cawangan Anti Dadah.

(d) Before they gained access into the said house SP2 knocked at the front door of the said house and shouted in Bahasa Malaysia as well as in Bahasa Hokkien "Polis, Polis - Buka Pintu" and 3 or 4 minutes later they heard some noise which sounded like someone climbing up the roof.

(e) SP3 then saw the figure of a man going through the atap roof of the said house and he shouted from the back of the house "Sudah lari, Sudah lari, Tangkap, Tangkap."

(f) Immediately thereafter the front door to the said house was opened by one male Chinese.

(g) The man on the roof then slid down onto the ground and was caught by SP3 with the assistance of SP4 and handcuffed.

(h) The man thus caught was identified as the accused who was at all material times not wearing any shirt.

(i) The accused was taken into the back portion of the said house and while the rest of the occupants were herded into the hall of the house in front, the accused was searched near the kitchen by SP2. He was searched only with the aid of torchlights which some members of the raiding party carried along but they did not switch on the electric lights in the kitchen.

(j) The accused was then not wearing any shirt but was wearing a pair of long pants (P4A). From the right side pocket of P4A, SP2 found 5 plastic packets and from the left pocket 4 plastic packets suspected to contain dadah - the nine packets being P3A to I.

(k) SP2 also found a wallet from the back pocket of P4A. The wallet being P7A with its contents being P7B to P7K.

(l) The three prosecution witnesses however said that not a cent of money was found in P7A.

(m) Immediately after the search, for some reason or other which none of the 3 prosecution witnesses could explain, P4A was removed from the accused and the nine packets of dadah (P 3A to I) were replaced into the long pants (P4A) which was then folded up with the wallet (P7A) and taken to Ibu Pejabat Daerah Polis, Butterworth with the accused.

(n) After P4A was removed from the accused he was wearing a pair of white short pants which SP2 admitted under cross-examination as follows:

> Sesudah saya menanggalkan ID 4A dari O.K.T seluar pendek berwarna putih yang dipakai oleh O.K.T. bukan seluar dalam tetapi seluar pendek. ...Saya tidak pasti seluar pendek yang O.K.T. pakai semasa itu ada atau tidak berpocket.

(o) SP3 also said that he was not sure whether the white short pants that the accused was wearing had a back pocket though he did say he saw "SP2 juga memeriksa seluar pendek dengan cara berasa dengan tangan". SP4 also saw "SP2 memeriksa seluar pendek O.K.T dengan tangannya."

(p) The accused was at all material times thereafter taken around and to the police station in this white short pants.

(q) The accused was at the time of the raid a man wanted by the Butterworth police for some reason though not for reasons involving dadah. As such, the raid on that night was not an anti-dadah raid but rather a raid by Cawangan Kongsi Gelap to apprehend the accused.

(r) The said house had a water-well in usable condition in one of the two divided portions in the rear portion of the house at the kitchen area and photographs P9I and J were the photographs taken of such well.

(s) All the nine plastic packets P3A to I were hermetically sealed.

(t) No personal belongings of the accused were found at the said premises. According to SP9 the said house was the then permanent address of ST1 whereas the electricity bill of same was in the name of one Cheah Guan Seng.

The TPR had also sought to adduce evidence of the result of the urine test of the sample taken from the accused. Defence Counsel objected. As the accused was not also charged for any offence such as under s. 15 of the Dangerous Drugs Act 1952 that would make such evidence in relevant, and such evidence do not directly relate to the current charge, the Court ruled that evidence on the urine test was not admissible as its prejudicial effect clearly outweighed its probative value.

At the close of the case for the prosecution the Court called for the defence upon application of the principle laid down in *Haw Tua Tau v. PP* [1981] CLJ (Rep) 11 approved and applied in the Federal Court case of *A. Ragunathan v. PP* [1982] CLJ (Rep) 63 and followed in *Sebastiano Robert Pavone v. PP* [1983] CLJ (Rep) 855.

The accused elected to give evidence on oath and from the witnesses offered by the prosecution the defence called only Cheah Poh Hoon (ST1) and Cheah Guan Leong (ST2).

Case for the defence was as follows.

The defence did not dispute (a), (b), (c), (d), (e), (f), (g), (h), (i), (p), (q), (r), (s) and (t) but all the rest of the evidence especially that of the three vital prosecution witnesses were strongly resisted by the defence as follows:

(i) At the material time of his attempt to escape and his apprehension he was only wearing the pair of white short pants mentioned by the prosecution witnesses and did not wear any long pants or P4A.

(ii) The pair of white short pants had a rear pocket, from which P7A was found when he was searched. The wallet P7A contained not only P7B to K but also contained cash of between RM180 to RM200.

(iii) Nothing else was found on the accused at the search on him and least of all P3A to I that is the nine packets were completely unknown to the accused.

(iv) Both the defence witnesses ST1 and ST2 had said that on the night before the early morning raid they saw the accused wearing the white short pants and they themselves had never seen the long pants (P4A) either worn or owned by the accused.

(v) At the time of the raid the accused went to sleep in his white short pants but without any shirt on him. He also slept with his wallet which was not a bulky or thick wallet.

(vi) The accused tried to escape through the roof when he heard the shout by SP2 "Police Police, buka pintu" as he knew then that he was then wanted by the police.

(vii) At the time the accused was caught he was only in his white short pants carrying the wallet P7A in his back pocket. There was no dadah found on him.

(viii) The accused testified that after he was brought into the van one of the police officers showed him P3A to I and said "Nah, inilah heroin dapat dalam telaga".

(ix) ST2 also said that when he asked one of the Indian raiding officers why the raid he said "dapat dadah di telaga di belakang."

(x) The accused and both the defence witnesses said that the occupants of the house woke up only when they heard the knock on the door by SP2.

(xi) The accused was only a casual occupant of the said house and was there because he wanted to sleep with ST1 who was then engaged to be married to him.

As there were two conflicting versions of the incriminating material portions of the evidence against the accused, the Court's decision on the matter would essentially be based on facts.

In short the defence story was that the charge against him was a frame up by the police as he was then a man wanted by the police. The nine packets of drugs used against him may have been found in the said house or at some other premises in their earlier raid but certainly they were not found on him and he was only a transient occupant of the said house.

The element of truth is required but the element of probability is the main factor so that if the Court accepts the defence story as probable even though it is not convinced of the truth, then the defence has succeeded in creating a doubt in the Court's mind.

It is important to note here even the prosecution witnesses had admitted that the accused was wearing a pair of white short pants, which was not an underwear, and in which the accused was also taken around and to the police station after his arrest. The prosecution witnesses were not sure whether the short pants had a pocket at the back which the accused said it had. Since it was established that the pair of white short pants were in fact short pants and especially when same was not produced by the prosecution it is highly probable that the white short pants had a pocket in its back.

The accused and the two defence witnesses had stated that the accused went to sleep without any shirt on but only in his white short pants. On this issue as well as in respect of all the other issues especially with regard to whether P4A was ever worn or owned by the accused, the prosecution had not broken or demolished the story of the accused or the defence witnesses.

On the issue of whether ST1 was an interested witness; there was unchallenged evidence that though she was the former girlfriend of the accused yet she had stopped seeing the accused for several years while he was in remand and had not talked to him even during the currency of the trial of this matter. Indeed, she had entered into a registered marriage with another man. However, it is settled law that there is no legal presumption that an interested witness (if ST1 was found to be one) should not be believed; he or she is entitled to credence until cogent reasons for disbelief can be advanced in the light of evidence to the contrary and the surrounding circumstances.

See *Public Prosecutor v. Foong Chee Cheong* [1970] 1 MLJ 97 wherein witness was related to the deceased and *Liow Siow Long v. Public Prosecutor* [1970] 1 MLJ 40 wherein no such cogent reasons were adduced in evidence or elicited from cross-examination.

ST2 who was the uncle of ST1, was not in any way related to the accused and came to know him only as a result of the accused's then relationship with ST1. Thus, ST2 could not be said to be an interested witness for the accused. Both ST1 and ST2 were in Court solely on account of their being subpoenaed by the prosecution.

Considering the unchallenged evidence of the defence and the totality of the evidence adduced - especially in view of the fast pace of the raid - it is highly improbable that the accused had slept with P4A which was loaded with the 9 packets of dadah and his wallet, with his white short pants underneath same; and with such a load (not to mention a hindrance to ease of movement) he climbed up the roof to escape from the raiding officers, who promptly nabbed him in such apparel.

There are also the following unsatisfactory features of the case which in the opinion of this Court has cast certain disquiet and doubts in the prosecution case namely:

(a) Why was the accused searched at the back of the said house only with the aid of torch lights, even though electric lights could have been switched on and he was deliberately segregated from the other occupants of the house who were in the front hall of the house.

(b) There was no explanation as to why, after the accused was searched in full view of SP3 and SP4, it was necessary to take off his pants.

(c) Why was the white pair of shorts also searched by SP2 if it did not have a pocket at the back of same?

(d) When produced in Court, P4A had attached to its waist a label made of paper-like material (such as the types used to facilitate selection by customers) with words "Jimmex collection size 29" appearing on the label. It is thus improbable that such label would still be on P4A as shown to the Court if worn or used by the accused.

(e) Why were the two photos of the well (P9 1 and J) taken and produced in Court if there were absolutely no significant developments of evidential value concerning same.

As the accused was then a wanted man and he was keenly aware of that, his attempt to escape from the police who was obviously on an anti-secret society raid on the morning of 3 December 1987, could not be said to be conduct inconsistent with his innocence, especially in regard to the drug offence which he was currently being charged.

This only leaves the Court to consider whether there was motive for SP2, SP3 and SP4 to frame the accused.

Whether there was such a motive would depend on the surrounding circumstances and facts of each case. (See *Public Prosecutor v. Chuah Aun Peng* [1991] 2 CLJ (Rep) 65 where it was held that there was no such motive and *Public Prosecutor v. Chee Kon Fatt* Penang High Court Cr. Trial No. 47 (58)-14-86 where it was held that there was such motive.

It is this Court's view that when one talks of motive of prosecution witnesses in such situations one should not be confined to merely personal motives. It stands to reason that the Court, when confronted with certain material inconsistencies in the prosecution case - as in the case before us - could reasonably come to the view that the fact that accused was a hotly wanted man by the police, could be such a motive for framing him in order to be rid of him as a menace to society, without any compunction for so doing. In recent years, the appellate Courts in England have, with increasing frequency set aside convictions upon grounds which tended to indicate that the charges against the accused persons may have been fabricated even though no personal motives of the police officers were involved.

Even three senior police officers acting in concert and talking in near perfect harmony on certain material details in their evidence - though drawing a blank on other pertinent details, as appeared to be the case here - should not, in the interest of justice, be allowed to claim exclusivity or monopoly to the truth without submitting to the Court's overriding duty to examine every detail in their evidence with the view to testing their veracity in conjunction with the rest of the evidence in their totality.

The story of the accused as to the alleged role of the 3 police officers may be true or may be false but even if false, the burden still rested on the prosecution to prove beyond reasonable doubt that the accused was in possession of the packets of drugs and only then

would the presumptions under ss. 37(d) and (da) of the Dangerous Drugs Act 1952 arise with regard to monoacetylmorphine in it.

In all the circumstances, I am not satisfied that the burden of proof which rested upon the prosecution had been discharged.

For the above reasons the Court finds that it is wholly unsafe to convict the accused upon careful consideration of the totality of the evidence adduced at the trial even though the Court is not convinced of the innocence of the accused.

My view is that the accused has succeeded in creating a reasonable doubt on the prosecution case and I therefore acquit and discharge him on the charge.

Also found [1992] 2 CLJ 1257